

Spring Indiana Judicial College
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**RECENT DEVELOPMENTS IN
INDIANA EVIDENCE LAW¹**

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- I. Relevance, Balancing Prejudice, and Special Rules of Relevance**
 - A. Relevance and Balancing Prejudice**

Most judges can recite the definition of relevant evidence. The difficulty comes when the definition must be applied to particular facts. The definition itself is broad, and arguably ambiguous. It clearly favors the admission of evidence. For example, in order to be relevant, evidence need not concern a matter in dispute; it need not prove a matter in controversy or an element of case. It need only have a any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.@ Ind. R. Evid. 401.

1. Houser v. State

¹ In all quotations, internal citations have been omitted.

In Houser v. State, [823 N.E.2d 693](#) (Ind. 2005), the Supreme Court of Indiana determined whether particular evidence met the definition set forth in Rule 401 of the Indiana Rules of Evidence. In Houser, the defendant was charged with murder during the course of a burglary. The defendant's girlfriend testified, without objection, that he frequently listened to a particular heavy metal song about sneaking around and . . . getting in people's stuff.@ The state offered as an exhibit the lyrics of the song, Night Prowler, by AC/DC, claiming that the lyrics were relevant to the element of Houser's intent in committing burglary and murder.@ According to the state's exhibit, the song describes an individual who sleeps during the day and prowls at night, who breaks down your door . . . [and] makes a mess of you.@ The defendant contested the relevance of the exhibit.

The Supreme Court concluded that "[a]s a general proposition, we do not believe there is a correlation between an individual's enjoyment of a particular piece of music and the individual's behavior. But the test of relevance requires only that the evidence have >any tendency= to make the existence of any fact of consequence more or less probable than it would be without the evidence. We can certainly envision circumstances where that would be the case. For example, see Bryant v. State, [802 N.E.2d 486, 498](#) (Ind. Ct. App. 2004).@

Yet the court recognized that the more difficult question was whether the evidence was actually offered to prove the character of the defendant in violation of Rule 404(b) or whether the evidence's probative value was substantially outweighed by the dangers enumerated in Rule 403. Defendant Houser, however, had not raised those issues in his objection, thereby waiving the claims.

2. Candler v. State

In Candler v. State, [837 N.E.2d 1100](#) (Ind. Ct. App. 2005), the Court of Appeals considered two relevance-related objections raised by the defendant. The defendant challenged the relevance of two witness' statements. The appeals court reviewed the ruling, based on an abuse of discretion standard, taking pains to point out the applicability of that standard. Specifically, the court noted that a different standard of review might be appropriate for admission of evidence that turned not on "factual determinations" but on legal conclusions. The court cited, in a footnote, cases in support of the point, *Swajian v. General Motors*, [916 F.3d 31](#) (1st Cir. 1990), *Evans v. State*, [727 N.E.2d 1072](#) (Ind. 2000), but ultimately applied the abuse of discretion standard in upholding the trial court's ruling.

3. Burks v. State

In Burks, [838 N.E.2d 510](#) (Ind. Ct. App. 2005), the court considered the prejudicial impact of evidence related to defendant's shooting of another person under Rule 403. The evidence which was produced was by virtue of a jury

question allowed under Rule 614. The defendant argued that the trial court's ruling allowed Rule 614 to override the weighing requirements of Rules 403 and 404(b).

When the jury presented the written question, defendant objected on the ground that the question would lead to matters that had been excluded by the order granting his motion in limine. The court allowed the question because it was "highly relevant," concluding that "Rule 404, in terms of identity and motive, makes this a very relevant question."

The appellate court acknowledged that it was "called upon to analyze the intersection between Jury Rule 20 in conjunction with Evidence Rule 614, allowing jurors to pose questions to witnesses, and Evidence Rule 403 and 404(b). The court noted that the trial court's ruling "can be read to indicate that the trial court thought that questions by jurors are entitled to weight not accorded to parties' questions when making the determination of whether an objection should be sustained." Noting that the court had addressed the proper procedure for allowing jurors to pose questions in *Ashba v. State*, [816 N.E.2d 852](#) (Ind. Ct. App. 2004)(the procedure includes two "filters," (1) determining the appropriateness of questions and (2) if appropriate, allowing parties opportunity to object, and ultimately rests on the trial judge's discretion.), the court disagreed with the notion that jury questions were entitled to a greater weight.

In *Trotter v. State*, [733 N.E.2d 527, 531](#) (Ind. Ct. App. 2000), *trans. denied*, we stated that a proper juror question is one that "allows the jury to understand the facts and discover the truth." We then explained: "Finally, we do not mean to say that every juror question which leads to the discovery of the truth or aids in the understanding of the evidence must be submitted. Not only must the answer clarify evidence for the jury but it also must be admissible under our rules of evidence." Thus, questions propounded by jurors are entitled to no less scrutiny under our rules of evidence than those propounded by parties. Arguably, the two filters built into the procedure subject juror questions to additional scrutiny.

Notwithstanding this analysis, the court concluded that it could not "determine that the trial court's balancing analysis was faulty" or that in light of all of the evidence in a case, a mistrial was warranted.

4. Gasper v. State

In *Gasper*, [833 N.E.2d 1036](#) (Ct. App. Ind. 2005), a challenge was made to the introduction of evidence, based upon its relevance. On appeal, the defendant attempted to challenge the evidence based upon the failure to establish a chain of custody. The court disallowed the argument, under the waiver doctrine: "Even though Gasper now attempts to fit a conversation between the trial court and his

defense counsel as to the origin of the washcloths into a chain of custody objection, we find that only a relevancy objection was lodged . . . at trial.

5. South Town Properties vs. City of Fort Wayne,

This case, found at [840 N.E.2d 393](#) (Ind. Ct. App. 2006), is an eminent domain proceeding. At issue was the value of property. The court set aside a rule from a 1969 case as follows:

Not all facts, however, are relevant to the fair market value of property. In *State v. Sovich*, [253 Ind. 224](#), 252 N.E.2d 582 (1969), an expert witness testified that his estimate of the value of a piece of property was partially based on the fact that changes that would be brought about by the highway project for which the property was being taken, including changes in traffic patterns, would impair the value of the property. The trial court granted the property owner's motion to strike this testimony from the record, and the State appealed.

On appeal, the State's essential contention was that the trier of fact, in determining the value of the property being condemned, could properly consider the decrease in market value occasioned by the project for which the property was being taken because the decrease affected the sale value at the time of the taking. In affirming the trial court's exclusion of the evidence, our Supreme Court held:

It is difficult to imagine a more specious argument. If [the State's] argument were adopted by this Court it would be a simple matter for any condemnor to depress property values merely by publishing details of the planned project. Although this Court has never addressed itself to this precise issue, it is clear that the weight of authority holds that neither an increase nor a decrease in the market value of the property sought to be taken, which is brought about by the same project for which the property is being taken, may be considered in determining the value of the property.

We believe that the rule announced in *Sovich* is essentially a rule of the relevancy of evidence. Since *Sovich*, Indiana has adopted the Indiana Rules of Evidence, and today, the relevancy of evidence is generally governed by Rules 401-403. . . . *Sovich* which basically stands for the proposition that evidence of changes in the value of property brought about by the project for which the property is being taken is irrelevant to the determination of the value of the property on the date of condemnation, i.e., the date the condemnation action is filed.

In this case, the "project" for which the Property is being taken is the revitalization of the entire Southtown area, and the incentives offered

by the City are part of that project. The Appellants contend that they should have been allowed to present evidence of the incentives because they increased the potential sale value of the Property at the time of the taking. Because this argument is essentially the same as that made by the State in *Sovich*, we reject it.

B. Special Rules of Relevance

1. Rule 412

a. Candler v. State, [837 N.E.2d 1100](#) (Ind. Ct. App. 2005)

The court here reviewed the trial court's ruling disallowing the defendant's Rule 412 evidence concerning the victim's prior accusations of molestation. The defendant desired to offer evidence that the victim "had made demonstrably false prior allegations of child molesting against her stepfather." Defendant sought admission under Rule 412. While the trial court disallowed the evidence, the court did allow two witnesses to testify about disclosures the child had made to them. The appellate court found no error in the trial court's ruling.

The court reasoned as follows:

Evidence Rule 412 provides that, with very few exceptions, in a prosecution for a sex crime, evidence of the past sexual conduct of a victim or witness may not be admitted into evidence. Certain evidence may be admitted, provided that it falls within one of the following exceptions: (1) evidence of the victim's or of a witness's past sexual conduct with the defendant; (2) evidence that shows that some person other than the defendant committed the act upon which the prosecution is founded; (3) evidence that the victim's pregnancy at the time of trial was not caused by the defendant; or (4) evidence of conviction for a crime to impeach under Evidence Rule 609. Ind. Evidence Rule 412. In addition to these enumerated exceptions, a common law exception has survived the 1994 adoption of the Indiana Rules of Evidence. This exception provides that evidence of a prior accusation of rape is admissible if: (1) the victim has admitted ^[**8] that his or her prior accusation of rape is false or (2) the victim's prior accusation is demonstrably false.

The appellate court had to review the correctness of the trial court's finding that the victim did not admit the falsity of the charges and the defendant did not establish that they were "demonstrably false." The court discussed whether the review should be by the abuse of discretion standard as set forth in *State v. Walton*, [715 N.E.2d 824](#) (1999) or under a clearly erroneous standard, set forth in

Davenport v. State, [749 N.E.2d 1144](#) (Ind. 2001), *reh'g denied*. Ultimately, the court applied a clearly erroneous standard in upholding the trial judge.

A helpful discussion about the two standards is included in the appellate opinion. The court states:

Although these standards of review have been treated the same, the clearly erroneous standard appears semantically to be more correct than the abuse of discretion standard when applied to factual determinations of the trial court. As Justice Boehm notes in a case involving factual findings: "Trial courts do not, however, have "discretion" to make findings. Rather, trial courts are to use their best judgment to arrive at the correct result. They are bound by the law and the evidence and it is usually an error, not an "abuse" if the appellate court disagrees. Trial courts must of course exercise judgment, particularly as to credibility of witnesses, and we defer to that judgment because the trial court views the evidence first hand and we review a cold documentary record. Thus, to the extent credibility or inferences are to be drawn, we give the trial court's conclusions substantial weight. But to the extent a ruling is based on an error of law or is not supported by the evidence it is reversible, and the trial court has no discretion to reach the wrong result. *Pruitt v. State*, [834 N.E.2d 90, 104](#) (Ind. 2005).

b. *Morrison v. State*, [2005 Ind. App. LEXIS 518](#) (March 31, 2005)

Here the issue was whether a mentally handicapped victim in a sexual battery and attempted criminal deviate conduct case could be questioned about a prior incident of touching. The defense argued that it was entitled to cross-examine the victim to rebut the inference that he was ignorant of sexual matters and to demonstrate that the victim had knowledge to either manufacture the claim or confuse the incident. The defense relied upon *Davis v. State*, [749 N.E.2d 552](#) (Ind. Ct. App. 2001), which the court distinguished, because in the case at bar, unlike in *Davis*, there was no issue of identity. The trial court's exclusion of the evidence was not an abuse of discretion.

2. Character Evidence – Rules 404 and 405

The special legal relevance rules pertaining to character evidence are complicated and frequently litigated. While relevant evidence is presumptively admissible, Rule 404 provides a presumption that character evidence, for purposes of showing action in conformity therewith, will be excluded, except in special limited circumstances.

Rule 404(a) sets out situations in which the defendant or the state may offer evidence despite its character implications. The defendant may offer evidence of pertinent traits of the defendant's character or of the victim's character, but once the defendant does so, the state has the opportunity to offer evidence in rebuttal. Another specific exception allows the state to offer evidence when the defendant in a homicide case argues that the victim was the first aggressor. In all of these situations, the court must determine the "pertinence" of the offered evidence.

Rule 404(b) conversely allows the admission of character evidence under a different circumstance. Evidence offered under Rule 404(b) is admissible when the evidence is used for a purpose other than proving propensity, such as when the evidence, though indicative of character, is actually offered for some other legitimate purpose, such as motive, intent, opportunity, plan, scheme, absence of mistake, or absence of accident. The difficulty in analyzing such evidence is two fold. First, the court must ascertain whether the ostensible purpose for which the evidence is offered is legitimate and relevant; second, the court must determine whether the probativeness of the evidence is sufficient to support its admission in light of the inherently prejudicial nature of such evidence.

The issue of the admissibility of character evidence for "some other purpose" is frequently before the Indiana courts. In ruling on a Rule 404(b) objection, the trial judge is required to (1) determine the relevance of the other act evidence to a matter at issue other than propensity and (2) balance the probative value of the evidence against its prejudicial effect under Rule 403.

While the opinions offer some guidance to trial judges, the final analysis is a factual one, largely driven by the issue on which the evidence is offered, the prejudicial impact of the specific character evidence, and the relative strength of the case.

a. Evidence about the Victim's Character under Rule 404(a)

In Welch v. State, [828 NE.2d 433](#) (Ind. Ct. App. 2005), the court considered defendant's effort to introduce evidence concerning the victim's character. Defendant argued that the evidence was admissible under Rule 404(a)(2), but the state objected to the evidence and filed a motion in limine to exclude it. The trial court excluded the evidence. On appeal, defendant based his argument on both the rule of evidence and on [Indiana Code Section 35-41-3-2\(a\)](#), which addresses self defense in Indiana.

Both the state and the defense relied on a 2002 Indiana Court of Appeals decision, *Brand v. State*, [766 N.E.2d 772](#). In *Brand* the appeals court contrasted "evidence offered to prove that a person acted in conformity with their character with evidence used to 'offer a glimpse into a defendant's mind at the time he acted

in self-defense.” In that case, the proffered evidence was relevant to state of mind, making it reversible error for the trial judge to exclude it.

The defendant in the instant case was less than clear as to whether the desired purpose of the evidence was to establish that the victim was using unlawful force or to establish the defendant’s state of mind in order to prove that defendant had a reasonable belief that force was necessary. Based primarily upon the appellate brief, the court concluded that the defendant was offering the evidence on state of mind. As such, the trial court was not in error under the circumstances of the case in excluding it.

In a similar case, Guillen v. State, [829 N.E.2d 142](#) (Ind. Ct. App. 2005), the defendant offered evidence of specific instances of the victim’s prior acts of reckless behavior while intoxicated, arguing that the evidence was admissible as a character trait. The defendant did not make an offer of proof of the instances, thereby creating a waiver issued under Indiana Rule of Evidence 103(a)(2). Notwithstanding waiver, the court addressed the merits of the argument and found it to be without merit.

The defendant’s argument that the evidence was admissible was that Rules 404(a) and 405(b) provided for its admission. Defendant did not argue that the evidence was admissible under Rule 404(b). Because defendant relied upon Rule 404(a), Rule 405 governed the available methods of proof, if the evidence was admissible. That rule specifically requires that when character is admissible, “proof may be made by testimony as to reputation or by testimony in the form of an opinion.” Specific instances, which the defendant wished to offer, may only be inquired upon on cross-examination, in the court’s discretion.

Defendant also argued that the evidence was admissible under Rule 405(b), which applies “in cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense.” Defendant’s claim was that the specific instances “were an essential element of his defense that [the defendant] did not hit the victim.” The appellate court noted that the defendant had no authority to support his claim of essential element and that it had found none. The court therefore could not conclude that the trial court abused its discretion by excusing evidence of specific instances of reckless conduct by the victim to show a character trait. The court also noted that the exclusion of the evidence, if in error, did not affect a substantial right of the defendant, due to the meager relevance of the evidence.

b. Exploring Context under Rule 404(b)

A good example of the importance of the factual context to a 404(b) ruling is Houser discussed in Section I above. There, the defendant challenged the admission of evidence that he was in jail during his interrogation by Indiana police

for the crime. The defendant testified that he was living in Kentucky and came back to Indiana when he learned that the officers wished to question him. While the court appreciated that this testimony alone did not open the door for cross-examination about his imprisonment, other testimony, including Houser's discussion of his procuring and ingesting LSD before the interview entitled [the State] to explore further the circumstances of Houser's admitted procurement of LSD and incarceration in Kentucky.

c Intent and Knowledge under Rule 404(b)

In Samaniego-Hernandez v.State, [839 N.E.2d 798](#) (Ind. Ct. App. 2005), the issue was the admission of evidence of a controlled drug buy which preceded the defendant's charge for possession of cocaine. Defendant objected to the evidence on the basis of Rule 404, claiming that the evidence which he characterized as prior bad act evidence should be excluded. The court disagreed and upheld the trial court's ruling admitting the evidence. The evidence was admissible under Rule 404(b) as evidence of knowledge on the part of the defendant. The defendant had put his knowledge of the cocaine in issue and had therefore "opened the door" to the admission of the evidence of the controlled buy. Because of the substantial probativeness of the evidence on the issue of knowledge, the trial judge likewise did not abuse his discretion in admitting the evidence despite claims of prejudice.

d. Methods of Proof when Character is Admissible

As was noted by the Court of Appeals in *Welch*, Rule 405 speaks to the types of evidence that may be offered if character evidence is admissible. The rule's application requires a previous finding that evidence of character is admissible, either because it is an essential element in the case or by virtue of the special rules set forth in Rule 404(a). Technically, since evidence offered under Rule 404(b) is not being offered to prove "character" but for some other purpose, Rule 405 does not apply to Rule 404(b) evidence.

Unless evidence of character is being offered to prove an essential element of the claim or defense, which is a determination that is made based upon the nature of the allegations and defenses in the case, evidence of character or traits of character must be by reputation or opinion evidence. If, however, character is an essential element of the claim or defense, proof may also be made of specific instances of conduct.

In Leisure v. Wheeler, [828 N.E.2d 409](#) (Ind. Ct App. 2005), a child custody and support case, the evidence at issue was the mother's current husband's criminal history. The court acknowledged that evidence of character is often excluded under Rule 404, but suggested that the evidence "was not being

admitted to show that [the man] stole or used drugs on another occasion, [but to] speak [to his fitness to care for the child.]" Thus, the court reasoned:

If a person's character is an issue in the case, character evidence has independent relevance and is not offered for the prohibited purpose of showing conforming conduct. We have previously said that a person's character may be a material fact in deciding who should have custody of children as fitness to provide care is of paramount importance. . . . When character has been put in issue by the pleadings as typically occurs in child custody cases, evidence of character must be brought forth. This conclusion is consistent with our common law, which has provided that in civil cases character evidence will be admissible if the nature of the underlying action places a person's character at issue.

Thus, turning to Rule 405, the court concluded that the mother's current husband's "character is a material issue in the case because if custody were to be modified, then he would be living in the same household as [the child] and helping to raise [the child]. " Admitting the evidence was not in error.

5. Rule 412 - Prior Sexual Activity

In Morrison v. State, [2005 Ind. App. LEXIS 518](#) (March 31, 2005), the issue was whether a mentally handicapped victim in a sexual battery and attempted criminal deviate conduct case could be questioned about a prior incident of touching. The defense argued that it was entitled to cross-examine the victim to rebut the inference that he was ignorant of sexual matters and to demonstrate that the victim had knowledge to either manufacture the claim or confuse the incident. The defense relied upon Davis v. State, [749 N.E.2d 552](#) (Ind. Ct. App. 2001), which the court distinguished, because in the case at bar, unlike in Davis, there was no issue of identity. The trial court's exclusion of the evidence was not an abuse of discretion.

C. Other Relevance Cases

Waldon v. State

1. In Waldon, [829 N.E.2d 168](#) (Ct. App. Ind. 2005), the court reminded judges that the common-law doctrine of "res gestate" no longer exists. Evidence issues arising under that doctrine are now evaluated under the general rules of relevance, and in particular under Rules 401 and 403.

APPENDIX for PART I

Rule 401. Definition of "relevant evidence".

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or undue delay.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence.

Rule 404. Character evidence not admissible to prove conduct; exceptions; other crimes.

(a) Character evidence generally. Evidence of a persons character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except

(1) Character of accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;

(2) Character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) Character of witness. Evidence of the character of a witness, as provided in Rules 607, 608 and 609.

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in

conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pre-trial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

Rule 405 (a) Reputation or Opinion.

In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct. Upon reasonable pre-trial notice by the accused of the intention to offer character evidence, the prosecution in a criminal case shall provide the accused with any relevant specific instances of conduct to be used in cross-examination.

(b) **Specific Instances of Conduct.** In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct.

Rule 412. Evidence of past sexual conduct.

(a) In a prosecution for a sex crime, evidence of the past sexual conduct of a victim or witness may not be admitted, except

(1) evidence of the victim's or of a witness's past sexual conduct with the defendant; (2) evidence which shows that some person other than the defendant committed the act upon which the prosecution is founded; (3) evidence that the victim's pregnancy at the time of trial was not caused by the defendant; or (4) evidence of conviction for a crime to impeach under Rule 609.

(b) If a party proposes to offer evidence under this following procedure must be followed: (1) A written motion must be filed at least ten days before trial describing the evidence. For good cause, a party may file such motion less than ten days before trial. (2) The court shall conduct a hearing and issue an order stating what evidence may be introduced and the nature of the questions to be permitted.

(c) If the state acknowledges that the victim's pregnancy is not due to the conduct of the defendant, the court may instruct the jury accordingly, in which case other evidence concerning the pregnancy may not be admitted.

II. Opinion Testimony, Experts and Lay Witnesses

A. Applicable Rules

Rule 701. Opinion testimony by lay witnesses.

If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.

Rule 702. Testimony by experts.

(a) If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise

(b) Expert scientific testimony is admissible only if the court is satisfied that the scientific principles upon which the expert testimony rests are reliable.

Rule 703. Bases of opinion testimony by experts.

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. Experts may testify to opinions based on inadmissible evidence, provided that it is of the type reasonably relied upon by experts in the field. Rule 704. Opinion on ultimate issue.

(a) Testimony in the form of an opinion or inference otherwise admissible is not objectionable merely because it embraces an ultimate issue to be decided by the trier of fact

(b) Witnesses may not testify to opinions concerning intent, guilt, or innocence in a criminal case; the truth or falsity of allegations; whether a witness has testified truthfully; or legal conclusions.

Rule 704. Opinion on ultimate issue.

(a) Testimony in the form of an opinion or inference otherwise admissible is not objectionable merely because it embraces an ultimate issue to be decided by the trier of fact

(b) Witnesses may not testify to opinions concerning intent, guilt, or innocence in a criminal case; the truth or falsity of allegations; whether a witness has testified truthfully; or legal conclusions.

Rule 705. Disclosure of facts or data underlying expert opinion.

The expert may testify in terms of opinion or inference and give reasons therefore without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

B. Important Commentary to the Rules

1. Rule 702 - Expert Witnesses

The Rule clarifies Indiana law. It makes expert testimony admissible whenever it will "assist" the jury. Prior Indiana case law sometimes stated a more restrictive standard that expert testimony was admissible only when the subject was "beyond the knowledge" of the average juror. It also makes "reliability" the standard for admitting scientific evidence. Prior Indiana case law sometimes applied the more restrictive "general acceptance" standard.

Part (a) is taken verbatim from URE 702 which is identical to [FRE 702](#) and consistent with existing Indiana law. Part (b) is not found in either URE or [FRE 702](#). It is based on existing Indiana law governing the admissibility of scientific evidence.

2. Rule 704 - Ultimate Issue

Lay witnesses may give their opinions on ultimate issues if the court finds them to be helpful and rationally based on perception. Witnesses may not state their opinions that specific allegations made by crime victims are true or that they believe the defendant to be guilty.

An expert opinion is admissible even though it embraces an ultimate fact in issue or invades the province of the jury. However, experts may not testify to purely legal conclusions.

C. Recent Decisions

1. Napier v. State, [827 N.E.2d 565](#) (Ind. Ct. App. 2005)

This case, on rehearing, revisits interesting issues about the admissibility of breath test instrument certification documents in lieu of live

testimony and of the breath test evidence ticket. In terms of relevance to expert testimony, the case involves the implications of confrontation and cross-examination rights when the results of a scientific test are introduced via document. After rehearing, the court concluded:

In examining the above, the evidence at issue here--instrument certification as well as operator certification--bears no similarity to the type of evidence that the Supreme Court labeled as testimonial. The common thread regarding the evidence described above is the type of evidence that it is gathered in an investigative or prosecutorial setting. To be sure, it is apparent that operators of the breath test machine are not certified for purposes that relate to any particular case. Rather, operator certifications in circumstances such as these should be considered a function that is ministerial in nature. And we again reaffirm our position that an operator's certification does not have a bearing on the issue of guilt or innocence.

Also, as we pointed out in our original opinion, it would be "unreasonable . . . to have a toxicologist in every court on a daily basis offering testimony about his inspection of a breathalyzer machine and the certification of the officer as a proper administrator of the breath test." As the State suggests, other evidence is available that would, perhaps, be sufficient to establish the proper performance of a breath test. For instance, an individual might testify that he observed the test operator perform the test properly, it may be possible for the State to admit a checklist into evidence detailing the steps that the operator took, or a videotape showing proper performance of the test could be admitted. Hence, evidence regarding instrument certifications absent a defendant's opportunity to delve into the qualifications of those who performed the certifications is permissible, and evidence relating to instrument certification is not testimonial in nature.

In sum, the evidence indicating that Officer Anderson was qualified as a breath test operator was properly admitted, and there is no requirement that live testimony must be offered as to instrument or operator certification.

2. Norfolk Southern Railway Company v. Estate of Wagers,
[833 N.E.2d 93](#) (Ind. Ct. App. 2005)

In this case, the trial court refused to exclude expert testimony that an employee's exposure to diesel fumes and asbestos played a significant role in the induction of lung cancer. The basis of the expert's conclusion that the employee had been exposed to diesel fumes and asbestos was testimony by employee's coworkers. This expert opinion was objected to, but allowed by the trial court.

The lawsuit was brought under FELA, but because it was adjudicated in state courts, state evidence rules applied. Indiana Rule of Evidence 702 has a subpart (b) that is not shared by the federal rules. Nonetheless, the Indiana Supreme Court has stated that the federal standards, including those set forth in *Daubert* in Indiana are “helpful” in applying Indiana evidence rules.

Rule 702 has explained in this way by the Indiana Supreme Court, in *Sears Roebuck & Co. v. Manuilov*, [742 N.E.2d 453](#) (Ind. 2001).

In adopting Evidence Rule 702, this Court did not intend to interpose an unnecessarily burdensome procedure or methodology for trial courts. By requiring trial courts to be satisfied that expert opinions will assist the factfinder and that the underlying scientific principles are reliable, Rule 702 guides the admission of expert scientific testimony. Although it authorizes the exclusion of purported scientific evidence when the trial court finds that it is based on unreliable principles, the adoption of Rule 702 reflected an intent to liberalize, rather than to constrict, the admission of reliable scientific evidence.

In *Norfolk Southern Railway*, the Court of Appeals undertook a thorough analysis of the evidence at issue and compared the expert testimony to that ruled upon in other cases, ultimately upholding the trial judge’s ruling. The court also concluded that the evidence was not unduly prejudicial, under the doctrine set forth in *Ollis v. Knecht*, [751 N.E.2d 825, 831](#) (Ind. Ct. App. 2001), trans. denied (2002), that “introduction of evidence with an unknown probative value regarding the only issue to be decided by the jury could be prejudicial to the opposing party and could cause confusion amongst the jury by giving them extraneous information to consider.” This argument the court concluded, went “to the weight of the evidence and not its admissibility.”

3. *J.M. v. N.M.*, [2006 Ind. App. 593](#) (March 31, 2006)

This case involves objections to a report by a Guardian Ad Litem based on the rules of evidence, specifically Rule 602, Rule 701, Rule 702, and Rule 702(B). No objections was raised at the pre-arbitration meeting, at which time the admission of the report was discussed. Additionally, the party objecting, the father in a domestic case, had been given the opportunity to question the GAL extensively about the contents of her report, and to use statements therein in his questioning of other witnesses. On appeal, the court noted that “[t]raditional rules of evidence do not always apply in arbitration proceedings. Significant here was the fact that of the 103 findings of fact made by the Arbitrator, only two were based solely on the GAL's recommendations. “Thus, even if the GAL's report and testimony were erroneously admitted, sufficient evidence from other sources supports the parenting time determination.” Thus, the issue did not merit reversal of the parenting time determination.

III. Evidentiary doctrine of Res Ipsa Loquitur

In a case reviewed last year, In a recent case, Rector v. Oliver, [809 N.E.2d 887](#) (Ind. Ct. App. 2004), the appellate court, reversed a grant of summary judgment, based on the applicability of the doctrine of res ipsa loquitur. *Res ipsa loquitur* is a rule of evidence which permits an inference of negligence to be drawn based upon the surrounding facts and circumstances of the injury. The court said:

The doctrine operates on the premise that negligence, like any other fact or condition, may be proved by circumstantial evidence. To create an inference of negligence, the plaintiff must establish: (1) that the injuring instrumentality was within the exclusive management and control of the defendant or its servants, and (2) that the accident is of the type that does not ordinarily happen if those who have the management and control exercise proper care. In determining if the doctrine is applicable, the question is whether the incident more probably resulted from defendant's negligence as opposed to another cause. A plaintiff may rely upon common sense and experience or expert testimony to prove that the incident more probably resulted from negligence. To invoke res ipsa loquitur, the plaintiff must demonstrate that the defendant had exclusive control of the injuring instrumentality at the time of injury. Exclusive control is an expansive concept which focuses upon who has the right or power of control and the opportunity to exercise it. The existence of multiple defendants or the possibility of multiple causes does not automatically defeat the application of res ipsa loquitur.

This year, the court again wrote on the doctrine. In one case the court upheld the trial court's use of the doctrine, which had resulted in a denial of summary judgment, and in the second, the court reversed a grant of summary judgment, based on the inapplicability of the doctrine.

In Syfu v. Quinn, [826 N.E.2d 699](#) (Ind. Ct. App. 2005), the court found that the trial court had correctly allowed the use of the doctrine to defeat a defense motion for summary judgment. The defendant argued that the doctrine was inapplicable because the plaintiff "failed to present expert testimony" that the defendant's conduct fell below the applicable standard of care. As the court explained:

The doctrine of res ipsa loquitur is a qualified exception to the general rule that the mere fact of injury will not create an inference of negligence. Res ipsa loquitur literally means, "the thing speaks for itself." Consequently, the facts or circumstances accompanying an injury may be such as to raise a presumption, or at least permit an inference, of negligence

on the part of the defendant. The doctrine of *res ipsa loquitur* is a rule of evidence which allows an inference of negligence to be drawn from certain surrounding facts. Application of the doctrine does not in any way depend on the standard of care imposed by law but, rather, depends entirely upon the nature of the occurrence out of which the injury arose. Whether the doctrine applies in any given negligence case is a mixed question of law and fact. The question of law is whether the plaintiff's evidence included all of the underlying elements of *res ipsa loquitur*.

A plaintiff relying on *res ipsa loquitur* may establish the second prong, and show that the event or occurrence was probably the result of negligence, by relying upon common knowledge or expert testimony. Expert testimony is required only when the issue of care is beyond the realm of the layperson. In other words, the standard of care need not be established by expert opinion when a doctor's conduct is understandable to the jury without extensive technical input. Id.

In the second case, Balfour v. Balfour, [830 N.E.2d 145](#) (Ind. Ct. App. 2005), the issue was whether the plaintiff had established negligence in light of her inability to pinpoint the date that the alleged act of negligence, leaving a gauge pad in her abdomen occurred. The plaintiffs claimed that the doctrine applied to supply an inference as to when the act of negligence occurred. The trial court deemed the doctrine inapplicable.

In reversing, the appellate court noted that “the doctrine of *res ipsa loquitur* is especially applicable in cases where, as here, a health care provider leaves a foreign object in a patient’s body. Expert opinion is not necessary to explain that [a foreign object] would not have been left in [the wound] absent negligence. From the evidence presented, it followed that the individual in exclusive control had the obligation to exercise reasonable care in removing the bandaging. Therefore, the plaintiffs satisfied the exclusive control element of the doctrine and created an inference of negligence.

The inference created by the doctrine was sufficient to defeat the summary judgment motion “even though the defendant presente[d] evidence tending to establish the absence of negligence. “Because [the plaintiffs] met their burden of production through the application of *res ipsa loquitur*, that evidence created a question of fact on the issue of negligence for the trier of fact.”

IV. Admissibility of Confessions

In Gasper v. State, [833 N.E.2d 1036](#) (Ind. Ct. App. 2005), the defendant attempted to persuade the appellate courts to adopt a rule of evidence requiring the recording of custodial interrogations. His argument for such a

rule was that it would provide a “speedy resolution to the question of a confession’s legality and admissibility.”

As the court noted, the defendant’s argument was an invitation to revisit the decision rendered in *Stoker v. State*, [692 N.E.2d 1386](#) (Ind. Ct. App. 1998).

Seven years ago, this court announced in *Stoker* that Article 1, Section 12 of the Indiana Constitution did not require law enforcement officers to record custodial interrogations in places of detention. Analyzing case law from other jurisdictions, we concluded that only two state courts imposed a requirement that custodial interrogations be recorded. . . . Turning our attention to the Indiana Constitution, we analogized the recording of statements during a custodial interrogation to the general rule with regard to evidence preservation issues as enunciated in *Arizona v. Youngblood*, [488 U.S. 51](#), 109 S.Ct. 333, 102 L.Ed.2d 281 (1988), *reh’g denied*. In *Youngblood*, the Supreme Court concluded that the Due Process Clause did not necessarily require police officers to preserve evidence which might exonerate the defendant. Accordingly, we held that *Stoker*’s due process rights under the Indiana Constitution were not violated because of the police officer’s failure to record his statements during custodial interrogation.

While we have to date stopped short of requiring electronic recording of interrogations as a constitutional prerequisite to the admissibility of any resulting statements by the defendant, we fully acknowledge the many benefits that would flow from recording interrogations. In *Stoker* we stated in dicta that:

although we impose no legal obligation, we discern few instances in which law enforcement officers would be justified in failing to record custodial interrogations in places of detention. Disputes regarding the circumstances of an interrogation would be minimized, in that a tape recording preserves undisturbed that which the mind may forget. In turn the judiciary would be relieved of much of the burden of resolving disputes involving differing recollections of events which occurred. Moreover, the recording would serve to protect police officers against false allegations that a confession was not obtained voluntarily. Therefore, in light of the slight inconvenience and expense associated with the recording of custodial interrogations in their entirety, it is strongly recommended, as a matter of sound policy, that law enforcement officers adopt this procedure.

Today, Gasper requests us to take an additional step and transform our recommendation to record interrogations into a constitutional requirement.

Even though Judge Sullivan cautioned us from following "the route of the lemming," in the instant case, we mirrored the research done in *Stoker* and fail to discern any change in this nation's case law since *Stoker* was decided. No state courts other than the courts in [Alaska and Minnesota] have imposed a requirement that custodial interrogations be recorded. However, since *Stoker* three states and the District of Columbia have, by legislation, imposed a recording requirement for certain types of cases and interrogations. the New Jersey supreme court established a committee to study and submit recommendations on the use of electronic recording of custodial interrogations.

The majority of states, reluctant to articulate a recording requirement as a matter of state constitutional law, have nonetheless acknowledged that recording of interrogations would act as a deterrent to police misconduct, reduce the number and length of contested motions to suppress, allow for more accurate resolution of the issues raised in motions to suppress and, at trial on the merits, provide the fact-finder with a complete version of precisely what the defendant did (or did not) say in any statement or confession. We do not dispute that the evidence of a defendant's alleged statement or confession is one of the most significant pieces of evidence in any criminal trial, and its potent quality is only magnified when the statement or confession is presented to the fact-finder through the testimony of the interrogating officers. However, lack of an electronic recording does not preclude the defendant from challenging the accuracy of the police officer's recollection of the interrogation.

Based on the current case law and this court's decision in *Stoker*, we again decline to impose a constitutional requirement to record custodial interrogations in places of detention. Consequently, we hold that . . . the Indiana Constitution does not require police officers to record custodial interrogations in places of detention. Nevertheless, as in *Stoker*, we strongly caution law enforcement officers not to abuse their unfettered discretion as to whether to record a defendant's statements during custodial interrogations. The lack of any recording generally results in the expenditure of significant judicial resources in an attempt to resolve disputes surrounding the circumstances and content of unrecorded statements. There can be little doubt that the electronic recording of a custodial interrogation benefits all parties involved. As even the most scrupulous witness is subject to forgetfulness, a recording would aid the fact-finder's assessment of weighing the testimony of a police officer against the testimony of the defendant by providing a more complete picture of what occurred. In light of the fact that most police departments today possess advanced recording material, we strongly encourage law enforcement officers, as a matter of sound policy and fairness of proceedings, to record all custodial interrogations.

